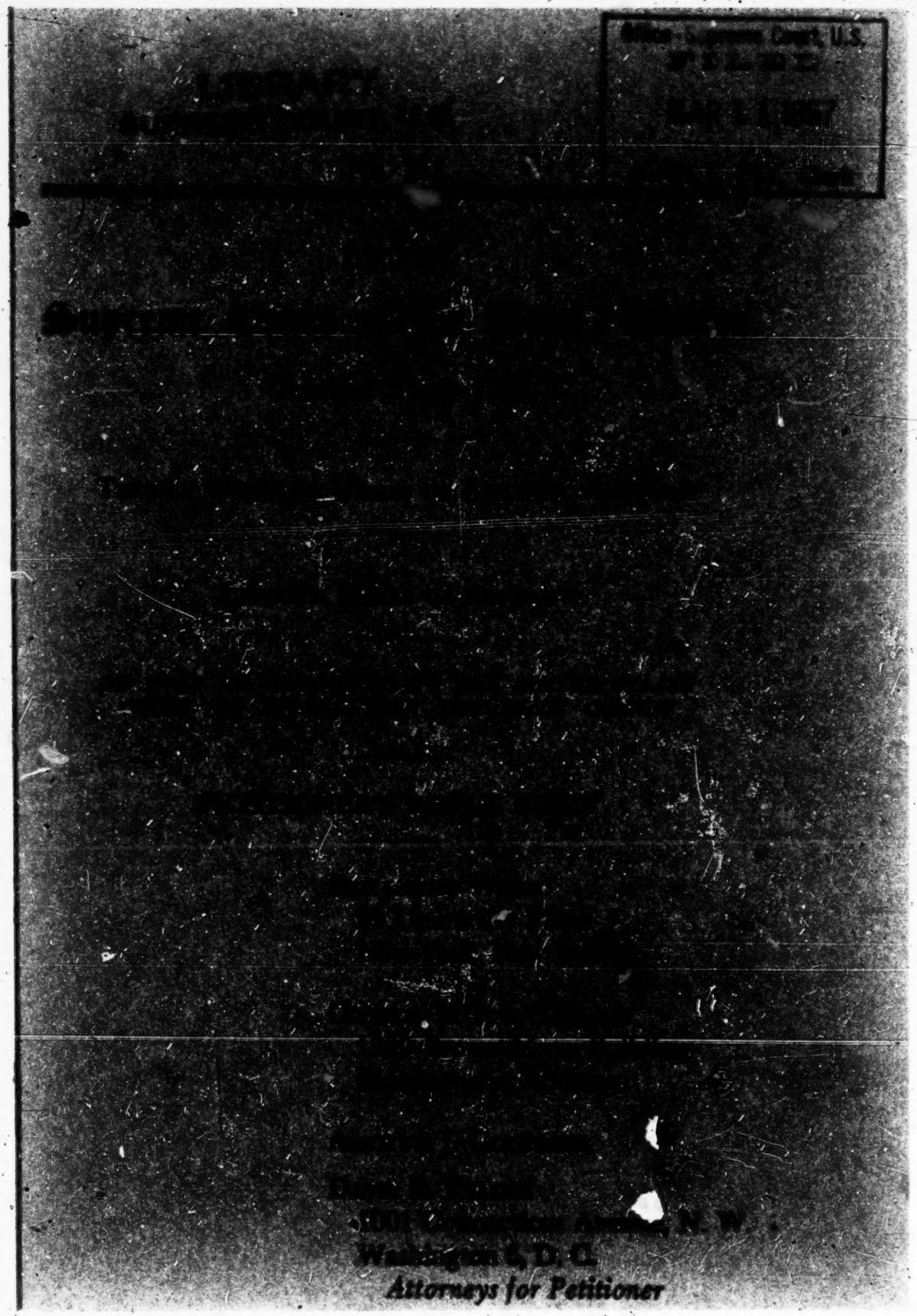
Washington 6, D. C.
Attorneys for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

No. 211

TEXTILE WORKERS UNION OF AMERICA, *Petitioner*

v.

LINCOLN MILLS OF ALABAMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

The brief for respondent Lincoln Mills of Alabama in this case contains, with one exception, no argument not already presented to the Court by the employer in the *General Electric* case, No. 276. Reply to those arguments has already been made in the brief for respondent union in the *Goodall-Sanford* case, No. 262, as well as in the brief for respondent union in the *General Electric* case itself. We will not burden the Court with repetition of matters set forth in those briefs and respectfully refer the Court to them. (A copy of the respondent union's brief in the *Goodall-Sanford* case has been served on the employer in this case.)

I—THE DUTY TO ARBITRATE ACCRUED GRIEVANCES AFTER THE AGREEMENT ON WHICH THEY ARE BASED HAS EXPIRED.

The single exception referred to above is the contention of the employer here that arbitration of grievances which arose under the agreement which expired on July 3, 1954, cannot be ordered because the agreement expired on that date.[1] Of course, the contract has also expired in the other cases now before the court and no one has even thought to suggest that this is a defense against arbitration as to whether the employer complied with the collective agreement during the term. But here, respondent asserts, the contract expired before the employer refused to arbitrate. Therefore, it is argued, there was no breach of the arbitration agreement during its term upon which a later enforcement proceeding can be based.[1a]

This issue was argued in the Court of Appeals but was not decided. As stated in the petition for certiorari, the issue was expressly left undecided by the majority in that Court because of their conclusion that in no event did the Federal courts have jurisdiction to enforce an agreement to arbitrate grievances. Judge Brown, dissenting, apparently did not even consider the issue serious enough to warrant discussion.

Judge Brown was obviously correct. If analogy be had to commercial arbitration the fact that the contract has expired is, of course, irrelevant. Indeed, the nature of commercial arbitration is such that it is almost always true that the contract has expired when arbitration is demanded. The usual complaint is that one party to the contract failed to deliver the promised goods, or to accept them, or to perform a charter party, or to pay moneys owed. What such

[1] Respondent's Brief, pp. 33-37.

[1a] Obviously, although this is not stated, there was no breach of the agreement which succeeded the one that expired on July 3, 1954, since the grievances arose under the earlier agreement.

arbitration normally seeks is an adjudication of the rights which have accrued as the result of a closed and completed commercial transaction.

In grievance arbitration, of course, the considerations are somewhat different. Unlike the commercial agreement, a collective agreement is a continuing one, providing the governing rules which are to prevail for a fixed period, usually of years, in the administration of wages, hours and working conditions. At its expiration it is usually replaced by a new agreement which continues, with changes, the rules previously in force. Arbitration in collective agreements is provided, as in this case, as a method by which the union can, consistently with the agreement and while continuing to observe it, challenge the interpretation and application of those rules by the employer. As we have ourselves urged, it is not a substitute for litigation over a completed transaction but a substitute for the strike as a method of policing the observance of the terms of the collective agreement.

Respondent accepts this distinction and, indeed, seizes upon it. It asserts that "the sole purpose and effect" of the arbitration provision

> ". . . was to create mutual consideration between the Company and the Union whereby the Company agreed that it would follow a specific procedure in the handling, discussion, and attempting to dispose of timely grievances brought by the Union on behalf of the employees during the life of the Agreement, and the Union, in turn, agreed that during the period such procedures were in effect, that it would not exercise, or avail itself of, its legal right to strike."

Therefore, respondent argues, when the Union regained its right to strike upon the expiration of the agreement, there was no further consideration and the Company had no further obligation to arbitrate.[2]

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[2] Respondent's Brief, p. 34.

There are several difficulties with this argument. The most important is that when the contract terminated the Company had already received its consideration. The grievances here arose, during the term of the agreement, when the Company in April and May of 1954, made certain changes in work-loads and job assignments. The no-strike agreement operated at that time to prevent any concerted action by the Union in protest against the changes. Instead, as required by the agreement, grievances were processed through the machinery provided in the agreement for their resolution.

When the agreement expired on July 3, 1954, it is true this procedure had not been completed. But the Company had already received the benefit of the union's no-strike agreement. The fact that, when the contract terminated, the union did regain the right to strike—as the Third Circuit noted in *Paterson Parchment Paper Co.* v. *IBEW*, 191 F. 2d 252 (1951)—detracts nothing from the fact that it had refrained from striking over these grievances, in accordance with its agreement, prior thereto. As David L. Cole, one of the country's most experienced arbitrators, has said in connection with a different argument—that the termination of the employer's business voids the duty to arbitrate:

> "The Company's suggestion that now that the Company has discontinued manufacturing and similar operations there is no need for the grievance and arbitration procedure designed to maintain good industrial relationships is not acceptable. If during normal operations the parties were given the benefit of improved relations by reason in part at least of the existence of these procedures, then the procedures should not be discarded, unless it is compulsory to do so, the moment one of the parties feels itself no longer interested in harmony. This dispute grows out of the employer-employee relationship, and the factors which prompted

the parties to agree upon an expeditious and informal means of resolving their differences are still entitled to weight. Rights and obligations arising out of, or accruing during the period of, such an agreement, even though payable or enforcebale later, are tied by the contract to the means provided for enforcing them, which may reasonably be held to survive along with the rights and obligations themselves." *Botany Mills, Inc.*, 27 Labor Arbitration Reports 1, 2 (1956).

That the obligation to arbitrate disputes arising during the contract term must continue beyond the term for at least a sufficient time to permit the use of the procedure is so plain that it is difficult to find cases in which a contrary argument has been made. The few cases we have been able to find hold unanimously, and summarily, that "the fact that the contract is no longer in existence is immaterial."

Lane v. *Endicott Johnson Corp.*, 274 App. Div. 833, 80 N.Y.S. 2d 639 (3d, Dept. 1948) *affd* 299 N.Y. 725, 87 N.E. 2d 450 (1949).

In re Poteker, 286 App. Div. 733, 146 N.Y.S. 2d 616 (1st Dept., 1955) *reversing in part* 141 N.Y.S. 2d 719 (Sup. Ct. 1955).

Columbia Casualty Co. v. *Drivers & Chauffeurs Local Union*, 279 App. Div. 552, 107 N.Y.S. 2d 90 (1st Dept. 1951).

In re Commercial Telegraphers Union, 123 N.Y.S. 2d 259 (Sup. Ct. 1953)

In re Freydberg, 21 LA 816 (Sup. Ct. N.Y. 1954).

As the Court said in *Jones* v. *Tidewater Oil Co.*, 22 LA 562 (Calif. Super Ct., 1954):

"It is the opinion of the Court that such disputes would come under the category of 'unfinished business,' which should be arbitrated and thus completed regardless of the contract's expiration. The fallacy of

holding otherwise is best illustrated by pointing out that grievances or disputes arising during the last few days of the contract's existence could not possibly be arbitrated as provided by the agreement purely because of lack of time."

II—THE QUESTION OF MOOTNESS.

In urging that the agreement to arbitrate unresolved disputes necessarily survives the termination of the agreement under which the disputes arose, we think it only fair to note that this general obligation would not prevent an employer from urging before an arbitrator that a particular grievance has become moot. This is an entirely different question—which has not been raised by the respondent in this case.

The fact that a collective agreement has expired may make some grievances moot. Whether it does so depends upon the nature of the grievance and the presence or absence of a continuing collective bargaining relationship represented by a new collective agreement which maintains the existing rules and standards in effect.

Some grievance arbitrations concededly have only prospective significance. Work load and safety grievances, in particular, are sometimes of that character. In other cases, the grievance may have both prospective and retrospective significance: the arbitration may decide not only what the proper rule should be under the agreement for the future but also whether retroactive pay is due, and how much, because of actions taken in the past. A discharge grievance is typical; the arbitrator's decision, if favorable to the union, will usually require both reinstatement of the discharged employees and back pay. Some grievances, finally, may have only retrospective significance, where the incident involved is isolated and non-repetitive and the only question is back pay or other benefits or where, as in the *Good-*

all-Sanford case, No. 262, the employer has gone out of business.

Obviously, in the case of a grievance with prospective significance only, if the contract has expired and there is not a continuing collective bargaining relationship represented by a new collective agreement, there may be nothing to arbitrate. Take a simple work load grievance in which there is no question of back pay. If the collective agreement has expired and it is not replaced by a new one, then the employer, as respondent here says, is free to manage its properties and business as it sees fit. It can increase or decrease work loads without reference to any standards at all. Under such circumstances, arbitration of a grievance claiming that work loads in the future should be adjusted to comply with an expired contractural standard would be meaningless. The grievance would be moot.

This is far different from saying that a company's agreement to arbitrate existing grievances terminates when the contract expires. Expiration of the agreement is simply a fact—similar to the fact that a grievant has died—which may or may not make a particular grievance moot, depending upon the nature of the grievance, the kind of relief requested in the arbitration, and whether or not the standards and obligations provided in one agreement are carried over into the next.

The grievances in this case are work load and job assignment grievances. Respondent, however, has not claimed that they are moot. In particular it has not urged that a decision as to the work assignments involved would not be effective under the contract which replaced the one that expired in July, 1954.[3] Even if it did, some of the grievances

[3] Such an argument, if made, would undoubtedly fail. After the contract here involved expired there was a strike. The strike was settled by an agreement that the July 3, 1954 agreement, with certain modifications, should remain in effect until June 30, 1957. It was also expressly agreed that the grievances involved in the present litigation would be arbitrated if so ordered by the Court.

—those that expressly ask for back pay commensurate with the increase in work loads instituted in April and May, 1954[4]—clearly cannot be moot. And back pay may be due in the other grievances, even if not specifically demanded, under the terms of Article VII (E) of the Agreement (R. 13), which provides that in any work load grievance "the Board of Arbitration shall have the right to adjust compensation retroactive to the date of any change."

Any possible question of mootness of particular grievances is properly left for the arbitrator to decide. The fact that back pay for work performed in April, May and June in 1954 clearly is involved in some of the grievances here does serve, however, to underline the error in respondent's argument that when the contract expired on July 3, 1954, the Company's obligation to arbitrate any grievances—including those dealing with pay for work already performed—terminated.

Respectfully submitted

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